

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODERICOL ANTONIO MURPHY,

Defendant-Appellant.

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UNPUBLISHED

April 28, 2005

No. 251975

Genesee Circuit Court

LC No. 03-012050-FC

Before: Donofrio, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of four counts of armed robbery, MCL 750.529, one count of carrying a concealed weapon (CCW), MCL 750.227, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. He was sentenced as a habitual offender, second offense, to concurrent terms of 216 to 360 months imprisonment for the armed robbery convictions, 24 to 90 months for the CCW and felon in possession convictions, and a consecutive term of two years for the felony firearm conviction. Defendant appeals as of right. We affirm.

Defendant first asserts that several instances of prosecutorial misconduct deprived him of a fair trial. A claim of prosecutorial misconduct is a constitutional issue, which is reviewed by this Court de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, defendant failed to object during trial to any of his claims of prosecutorial misconduct. Consequently, as an unpreserved issue, we review such for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant cites four instances during which he claims the prosecutor acted improperly. Defendant begins by asserting that the prosecutor used the officer in charge of the investigation, Scheidler, to testify in such a manner so as to assure the statements provided to police by defendant's accomplice, Greer, were accurate. Greer implicated defendant in his statements to police officers investigating the crime. The prosecutor questioned Scheidler about his methods of interrogation and whether his observations of Greer gave him a sense as to whether Greer's initial statements to police were truthful. Evidence had already been admitted during Greer's testimony that he had given inconsistent statements to the police, and defendant impeached Greer with these prior inconsistent statements. The prosecutor's questions objected to by defendant

were in response to defense counsel's impeachment of Greer. Rather than eliciting evidence from Scheidler to bolster the credibility of Greer, the questioning by the prosecution aided the jury by explaining why the police would continue to question Greer after his first and second statements. Under these circumstances, the prosecutor's questions were not inappropriate. A finding of misconduct may not be based upon a prosecutor's good faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Defendant next argues that the prosecutor inappropriately elicited testimony from Scheidler that defendant invoked his right to remain silent. We note the trial court's recognition of defendant's opening statement in which he claimed that the police did not give him a real opportunity to speak with them. Under these circumstances, had the prosecutor not been allowed to ask Scheidler whether he had attempted to talk to defendant, the jury would have been left with an incomplete picture and inaccurate belief that the police had not attempted to get defendant to tell them his side of the story. This questioning was an appropriate response to defendant's argument. Furthermore, nothing in Scheidler's or defendant's testimony supports defendant's argument that he invoked his right to remain silent during his interview with Scheidler. We therefore find this argument to be without merit.

Defendant next argues that the prosecutor introduced irrelevant and inadmissible evidence about defendant's possession of cocaine and an implication that the car used during the robbery was stolen. Defendant specifically argues that such evidence was inadmissible MRE 404(b) evidence because, pursuant to the rule, "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

However, evidence that is part of the *res gestae*, or, as defined in Black's Law Dictionary (7<sup>th</sup> ed, 1999), "the events at issue, or other events contemporaneous with them," does not implicate MRE 404(b). As noted by our Supreme Court in *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978):

It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence. [Citations omitted.]

The evidence admitted regarding cocaine possession and the condition of the car used were part of the "complete story." Furthermore, evidence that defendant possessed cocaine was also admissible to demonstrate a possible motive for the robbery – to pay for defendant's drug habit. Under these circumstances, defendant has not shown that the evidence was inadmissible or irrelevant; therefore, defendant has failed to show improper conduct by the prosecutor.

Finally, defendant argues that the prosecutor improperly questioned defense witness Jerome Montgomery concerning his pending case, which prompted him to invoke his Fifth Amendment right to refuse to answer questions. "[P]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence that might bear on the accuracy and truth of a witness' testimony." *People v*

*Layher*, 464 Mich 756, 765; 631 NW2d 281 (2001), quoting *United States v Abel*, 469 US 45, 52; 105 S Ct 465; 83 L Ed 2d 450 (1984). Evidence that Montgomery was in jail with both defendant and Greer, charged with armed robbery as is defendant, and unwilling to tell police who was with him during his offense, tends to show his bias toward others charged with the crime and his willingness to help defendant. Such testimony bears on the credibility of Montgomery's testimony that he told Greer to tell police who was with him when he himself would not do so. Under these circumstances, defendant has failed to show misconduct.

Defendant next asserts that the trial court's instruction regarding Montgomery's refusal to answer questions during cross-examination resulted in manifest injustice. However, defendant did not object to the instruction challenged on appeal and, when given the opportunity to note any corrections needed to the instructions given, indicated his acceptance of the instructions; therefore, defendant has waived this issue on appeal. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Because defendant waived this right, there is no error to review. *Id.* at 219; *People v Hall*, 256 Mich App 674, 679; 671 NW2d 545 (2003).

Finally, defendant asserts that he received ineffective assistance of counsel from his trial counsel where counsel failed to object to the prosecutorial misconduct and the instruction regarding Montgomery's refusal to answer questions. We disagree because counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). As noted above, defendant has failed to show any prosecutorial misconduct and the instruction given by the trial court regarding Montgomery's refusal to answer questions on cross-examination was proper.

Affirmed.

/s/ Pat M. Donofrio  
/s/ William B. Murphy  
/s/ Stephen L. Borrello